Riverdale Nursing Home, Inc. and N and W Registry, Inc., Joint Employers *and* Nelson R. Nunez. Case 2–CA–27202

June 19, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On March 15, 1995, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondents jointly filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.

1. The Respondents have excepted to the judge's denial of a motion by Respondent Riverdale Nursing Home, Inc. (Riverdale) to adjourn the hearing to a later date. On January 16, 1995, Riverdale requested an adjournment of the hearing due to the unavailability of Riverdale's administrator, who, it asserted, was an essential witness in the case. In its motion, Riverdale noted that Respondent N and W Registry, Inc. (N and W) had acceded to its request for an adjournment. Counsel for the General Counsel, however, opposed the motion, stating that the hearing, which was scheduled for January 23, 1995, had been calendared for over 7 months and that he had trial conflicts on Riverdale's proposed alternate dates.

Riverdale's motion was referred to Associate Chief Administrative Law Judge Edwin H. Bennett, who denied the motion in an order dated January 17, 1995. Judge Bennett noted in his Order that the hearing had been scheduled for over 7 months and that ''Respondent merely asserts the unavailability of an essential witness but presents no supporting details to justify its request made at this late date.'' At the hearing, the Respondents, who by this time were jointly represented, renewed the request for adjournment. Despite the fact that the original motion was denied by Judge Bennett in large part due to the Respondent's failure to provide supporting details concerning the reason for the absence of an essential witness, counsel for the Respondents again failed to substantiate at the hearing any justification for their witness's absence. Judge Biblowitz, who presided at the hearing, properly denied the Respondents' renewed motion for an adjournment for the reasons given by Judge Bennett in his January 17, 1995 Order.

2. The judge found that Riverdale and N and W are joint employers exercising common control over the employment of certain employees of Riverdale, including Charging Party Nelson Nunez. Respondents excepted to this conclusion, and we find merit in the exception.

The only evidence adduced to support the conclusion that the Respondents are joint employers is found in the testimony of Nunez, who stated that over the course of his 2-year employment at Riverdale he received some paychecks and a W-2 form from N and W. Nunez had absolutely no contact with N and W, however, and he provided no testimony about the nature of the relationship between Riverdale and N and W. Nunez' testimony indicates that he was hired, supervised entirely, and fired by Cruz Matos, a supervisor employed by Riverdale.

The Respondents, who were jointly represented at the hearing, put in no evidence in defense of the allegations contained in the complaint. The General Counsel subpoenaed from both Respondents business records that would have shed light on the relationship between the two entities. Neither Respondent, however, complied with the subpoenas, and the General Counsel never moved to enforce them. In addition, the Respondents produced no witnesses to testify regarding either the joint employer allegation or the substantive allegations of the complaint, and the General Counsel did not compel such testimony. Consequently, the General Counsel based his case regarding the joint employer status of the Respondents solely on Nunez' testimony that he received some paychecks and a W-2 form from N and W over the course of his 2-year employment at Riverdale.

From the Respondents' noncompliance with the General Counsel's document subpoenas and their failure to produce any witnesses whatsoever to testify in rebuttal, the judge drew an inference adverse to the Respondents that such evidence, if produced, ''would have established that N and W had additional control over Nunez' terms and conditions of employment.'' The judge concluded that Nunez' testimony, when considered together with the adverse inference and the fact that the Respondents were jointly represented by counsel, was sufficient to establish a joint employer relationship between the two Respondents. We think the judge erred in concluding that the Respondents in this case are joint employers.

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In order to establish that two otherwise separate entities operate jointly for the purposes of labor relations, there must be a showing that the two employers ''share or codetermine those matters governing the essential terms and conditions of employment.'' *TLI, Inc.*, 271 NLRB 798 (1984), citing *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982). The employer in question must meaningfully affect ''matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.'' *TLI*, supra. The determination of whether two entities are joint employers ''is essentially a factual issue.'' *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

The record in this case is devoid of any direct evidence that N and W meaningfully affected Nunez' employment. Nunez testified that he had no contact with N and W whatsoever and that his entire employment relationship with Riverdale was under the control of Matos, a Riverdale supervisor who hired, managed, and fired him. The evidence regarding Nunez' receipt of some paychecks and a W-2 form from N and W is simply not enough, standing alone, to meet the evidentiary standard as established above.

Furthermore, we think the judge's use of the adverse inference to fill this evidentiary gap sweeps too broadly. With so little direct evidence on the record to indicate a joint employer relationship between the two Respondents, the adverse inference drawn by the judge constitutes virtually the General Counsel's entire case regarding the Respondents' joint employer status. Based on this record, there is insufficient evidence to conclude that Riverdale and N and W are joint employers with common control over the employment of Nunez. Accordingly, we dismiss the complaint against N and W.

3. We adopt the judge's conclusion that Respondent Riverdale discharged Nunez because of his attempts to join the Union and obtain the benefits of the union contract in violation of Section 8(a)(3) and (1) of the Act. There is clearly substantial evidence, as outlined by the judge in his decision and without the use of an adverse inference, to support his conclusion that Respondent Riverdale terminated Nunez because of his efforts to join the Union and secure the benefits of the collective-bargaining agreement.

Accordingly, we shall modify the judge's conclusions of law, recommended Order, and notice to reflect our holding that Respondent N and W is not a joint employer vicariously liable for the violations of the Act committed by Respondent Riverdale.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 1.

''1. Respondent Riverdale Nursing Home, Inc. is an employer within the meaning of the Act and has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.''

2. Substitute the following for Conclusion of Law 3.

''3. Respondent Riverdale Nursing Home, Inc. violated Section 8(a)(3) and (1) of the Act by discharging Nelson Nunez on or about February 18, 1994.''

ORDER

The National Labor Relations Board orders that the Respondent, Riverdale Nursing Home, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Local 144, Hotel, Hospital, Nursing Home and Allied Services Union or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Nelson Nunez immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(b) Remove from its files any reference to the unlawful discharge and notify Nunez in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in the Bronx, New York, copies of the attached notice marked ''Appendix.''[2] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against our employees because they engaged in activities in support of Local 144, Hotel, Hospital, Nursing Home and Allied Services Union or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Nelson Nunez immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify [each of them, him, her] that we have removed from our files any reference to his [her] discharge and that the discharge will not be used against him [her] in any way.

RIVERDALE NURSING HOME, INC.

Eric Brooks, Esq., for the General Counsel.
Stuart Bochner, Esq. (Horowitz & Pollack), for the Respondents.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on January 23, 1995, in New York, New York. The complaint, which issued on May 23, 1994,[1] and was based on a charge and an amended charge filed by Nelson R. Nunez on February 22 and April 26, alleges that Riverdale Nursing Home, Inc. (Respondent Riverdale), and N and W Registry, Inc. (Respondent N and W, and at times collectively called Respondents), allegedly joint employers, discharged Nunez on about February 18 in violation of Section 8(a)(1) and (3) of the Act.

[1] Unless indicated otherwise all dates referred to 1994.

FINDINGS OF FACT

I. JURISDICTION

Respondent Riverdale is a corporation with an office and place of business located in the Bronx, New York (the facility), and is engaged in the operation of a nursing home providing medical care for the aged. Annually, it derives gross revenues in excess of $100,000 and purchases and receives at the facility goods valued in excess of $5000 directly from points outside the State of New York. I find that Respondent Riverdale has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint also alleges that Respondent N and W is a corporation with an office and place of business in Brooklyn, New York, where it has been engaged in the operation of an employment referral service for the health care industry; Respondent N and W denies this allegation. It is further alleged that Respondents are joint employers and Respondents deny this allegation as well.

II. LABOR ORGANIZATION STATUS

Respondents admit, and I find, that Local 144, Hotel, Hospital, Nursing Home and Allied Services Union (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

The Union represents certain of the employees employed by Respondent Riverdale, including housekeepers, attendants, maintenance workers, dishwashers, kitchen helpers, cooks, assistant chefs, chefs, dietitians, and assistant dietitians, among others. The contract in effect during the period herein had a duration of April 1, 1981, through March 31. The contract required all employees employed in the bargaining unit to become members of the Union within 30 days.

Nunez went to the facility on December 16, 1991, to get a job; his father had been employed there and told him to speak to Cruz Matos, the food service director at the facility. He met with her in her office at the facility, and she told him that he was hired as a diet aide (pot washer), explained to him what he would be doing, and that he would begin work immediately. She also had him sign a copy of ''Personnel Policies and Regulations for Riverdale Nursing Home,'' as well as a listing of his job responsibilities, also on Respondent Riverdale's letterhead. She told him that after a few weeks of employment he would need an identification badge, and a few weeks later he went to the office of Respondent Riverdale's administrator, had his picture taken, and received an identification card with Respondent Riverdale's name listing him as a pot washer in the dietary department. Matos prepared the work schedule for the kitchen employees monthly, and made revisions on the schedule as well. Nunez performed the same work as other dishwashers at the facility, had a timecard that was maintained with the other employees, and was listed on the work schedule together with the other kitchen employees. He regularly worked on Saturday and Sunday, but he was also called to work to cover for other employees; it was Matos who called him on those occasions. In 1992, he filled out a form of Respondent Riverdale for requesting vacation or other days; Matos signed the form as ''Supervisor's signature.'' Nunez also signed an

''Absence Report Form'' for Respondent Riverdale in September 1993; Matos signed as ''Authorizing signature.'' On one occasion he felt that the amount on his paycheck was not correct and he told Matos about it and she corrected it. On another occasion, he asked Matos for some time off because he was unable to work due to an injury that he received and she granted him the time off. When he returned to work he gave Matos a doctor's letter stating that he should perform lighter service and she put him on lighter duty for about a month.

His first check while employed at the facility was under the same ''SSI Agency.'' Sometime thereafter, the company name on his paychecks changed to Respondent N and W, although there had been no change in his job responsibilities. He also received a W-2 form from Respondent N and W, although he never had any contact with anybody from Respondent N and W.

Beginning about early 1992, Nunez complained to Matos that he was not receiving the benefits, such as sick days, vacations, and holidays, that other employees at the facility, who were union members, were receiving. Matos first told him that he didn't get the benefits as he was not eligible to join the Union because he did not work enough hours. Subsequently, she told him that he was not eligible for the benefits because he was working for an agency. He told her that he had not been hired through an agency and that she knew that because she interviewed and hired him. She told him ''that these were matters of the administration. It was not her problem.'' On about six or seven occasions during his employment at the facility he complained to Matos about not being in the Union. In July 1992, he filed a grievance through the Union that he was not allowed to be in the bargaining unit and Union. The grievance states that it was withdrawn in 1993. In November 1993, Nunez filed an unfair labor practice charge against Respondent Riverdale, alleging that it violated Section 8(a)(3) of the Act by refusing to allow him to join the Union and be covered by the Union's contract with Respondent Riverdale. He withdrew the charge the following month. On December 1, 1993, Nunez filed another grievance with the Union stating: ''Mr. Nunez has still not been placed in the bargaining unit to date.'' About a week later, Martha Cayaso, business representative for the Union, called him and told him that she had arranged for a meeting with Philip Buchsbaum, the administrator of the facility. On about December 8, 1993, Cayaso, a union delegate, and Nunez met with Buchsbaum in his office. Nunez testified that Cayaso asked Buchsbaum why Nunez was not in the Union and he said that he had other employees who were not in the Union and that he ''wasn't signing checks for me.'' He also said that if he wanted to, he could fire Nunez, but they wouldn't do it because they were happy with his work. At one point, Cayaso told Nunez that Buchsbaum wanted to speak privately with her, so Nunez left.

Cayaso testified that, after Nunez filed his grievance, she called Buchsbaum and arranged to meet at his office at the facility on about December 6, 1995. She discussed a number of grievances with him, including Nunez' December 1, 1993 grievance. She asked him why he didn't let Nunez join the Union because he had been employed at the facility since 1991. Buchsbaum said that he couldn't help her with that grievance, because Nunez did not work for him, he worked for an agency. Cayaso could not specifically recollect the agency name: ''S and W, something like that.'' Buchsbaum told her that he could help her with other grievances, but not with Nunez': ''He cannot help me with anything relating to agency employees.'' She asked him what the problem was with Nunez; he was on the schedule and was doing his job. Buchsbaum said, ''I have no problem with his work. We are happy with his work, but you insist and let him join the Union, I . . . have to let him go.'' Cayaso said that she would like to have Nunez present at the meeting and they agreed to meet about 2 days later, at the same place, with Nunez. At this meeting, Cayaso again asked Buchsbaum why he didn't let Nunez join the Union and Buchsbaum said that as he had previously told her Nunez did not work for him. She told him that Nunez had told her that he was hired by Matos, Respondent Riverdale's supervisor, and didn't know anything about an agency. She said that he did the same work as others at the facility, the only difference is that his payroll check is from another company, ''So you have to bring him to the Union.'' Buchsbaum said that he was not a permanent worker, and Cayaso said that he was not an on-call employee, because he was on the schedule. Buchsbaum said that they call him when somebody calls in sick. She said that Buchsbaum had previously said that he was happy with Nunez' work and Buchsbaum, who appeared to become angry, said, ''Yes, we like his work. But if you insist . . . I can fire him now.'' Buchsbaum asked if they could speak privately, and Nunez left. Buchsbaum told her that prior business agents never gave him problems, and that although he was happy with Nunez' work, if the Union insisted that he be allowed to join the Union, he would let him go.

On December 9, 1993, Nunez filled out a union dues-authorization form; on Cayaso's instructions, he gave one copy to the Union and brought the other portion to Respondent Riverdale that same day. He gave it to the bookkeeper, who told him that he couldn't get into the Union because he was from a different agency. Buchsbaum, who was in the room at that time, made a waving motion with his hand to the bookkeeper, indicating that she should accept the card, which she did, and Nunez left. Nunez testified that in February, Cayaso told him to fill out another union dues-authorization card and that the Union would send it to Respondent Riverdale to pressure them to let him join the Union. He testified that he filled out and dated this form on February 10, although the date is difficult to decipher. He gave a part of this form to Cayaso, and gave the other part to another department of the Union.

Theresa Copeland, who is employed by the Union as a clerk typist/word processor, testified that she typed a letter, dated December 16, 1993, demanding arbitration of Respondent's ''failure/refusal to allow Nelson Nunez . . . to join the collective bargaining unit.'' She then brought the letter to the Union's mailroom and never received the letter back. By letter dated December 27, 1993, counsel for the Greater New York Health Care Facilities Association, the association through which Respondent Riverdale negotiates with the Union, wrote to the arbitrator in response to the Union's letter dated December 16, 1993: ''The Union's demand for arbitration in the above-named matter must be denied due to the fact that the grievant is not employed by Riverdale Nursing Home, nor had he ever been employed by Riverdale Nursing Home.'' Copeland also identified a letter,

dated February 10, from the Union to the Respondent Riverdale, stating, inter alia:

> As you know, the Union Security clause of your collective bargaining agreement with the Union requires an employee, upon completion of thirty days to become member in good standing with the Union.
>
> Enclosed please find copies of the dues deduction cards which is necessary for you to begin check-off for the following workers:
>
> Nelson Nunez Lorraine Nesbeth

She typed this letter and brought it to the Union's mail room. The certified mail receipt for this letter, undated, was received in evidence.

As stated above, Matos prepares a monthly schedule for the kitchen employees, posts it prior to the end of the prior month, and makes whatever changes are necessary on it. Her name is the top one on the schedule, with the classification food service director. Nunez' classification on the schedule is utility man under a classification: ''On call staff.'' The monthly schedule for November 1993 was received in evidence. Because of many crossouts and changes it is difficult to determine how many days Nunez worked that month, but it appears to be between 10 and 13 days. The February work schedule for the dietary department was posted in late January; prior to February 18 Nunez worked, or was scheduled to work, about 10 days that month. His final day of work at the facility was February 16. He was scheduled to work on February 18 from 6 p.m. to 2 a.m. At about noon that day Matos called him at home and told him, ''You are not working for us anymore.'' When he said, ''Oh, yeah?'' she replied, ''No, you're outside the schedule.'' She never gave a reason, only saying, ''Today, I don't know anything.'' Nunez was able to obtain a post-February 16 copy of the February work schedule; it shows that his post-February 16 workdays are erased from the schedule.

IV. ANALYSIS

It is alleged that Respondent Riverdale and Respondent N and W are joint employers. The evidence establishes that for his 2 years and 2 months of employment at the facility, Nunez was employed by Respondent Riverdale. He was interviewed and hired by Matos, clearly a supervisor within the meaning of the Act for Respondent Riverdale. She told him what work he was being hired to do, had him fill out the required employment forms, all containing Respondent Riverdale's name, and scheduled his hours, as well as the hours of the other kitchen employees, on a monthly basis. He performed the same work as the other dishwashing employees, had his timecard together with the other kitchen employees, and wore an identification card containing Respondent Riverdale's name. The only differentiating factor between him and the other employees at the facility, apparently, is that his paycheck and W-2 form came from Respondent N and W, although, originally, when he was first hired, the company name on his paycheck was ''SSI.'' What makes this issue somewhat difficult is that there is absolutely no record evidence about Respondent N and W, other than that they prepared Nunez' paycheck and W-2 form. Counsel for General Counsel subpoenaed numerous documents relevant to this issue from Respondents, but counsel for Respondents refused to turn over any of these documents. In addition, Respondents presented no witnesses.

In *TLI, Inc*., 271 NLRB 798 (1984), the Board, citing *NLRB v. Browning Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982), stated:

> There the Court found that, where two separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for purposes of the Act. Further, we find that to establish such status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction.

In *Brown Ferris*, the court stressed the difference between joint employer and single employer status, and that joint employer status does not depend on the existence of a single integrated enterprise, nor does it require a finding of a lack of arm's-length transaction or unity of control or ownership, as is required in single employer cases. All the cases on the subject agree that the issue of whether an employer possesses sufficient control over certain employees employed by another to constitute a joint employer is essentially a factual issue. *Laerco Transportation*, 269 NLRB 324 (1984). In *Holyoke Visiting Nurses Assn.*, 310 NLRB 684 (1993), that employer provided home care and nursing services. It obtained nurses from a referral agency for nurses. The Board found that the home care agency and the referral agency constituted joint employers because both ''exercised sufficient power over the employees in question.''

The evidence establishes that Respondent Riverside controlled every aspect of Nunez' employment (and lack of employment as evidenced by the fact that Matos fired him on February 18) except for one aspect, the fact that he was paid by a check from Respondent N and W and received his W-2 form from Respondent N and W. This factor, while appearing minor, indicates that Respondent N and W shares matters concerning Nunez' terms and conditions of employment with Respondent Riverdale. *Sinclair & Valentine Co.*, 238 NLRB 754 (1978); *Manpower, Inc*., 164 NLRB 287 (1967). In *AMP, Inc.*, 218 NLRB 33, 35 (1975), the administrative law judge, as affirmed by the Board, found that one employer was a joint employer with another when its only actions were the recruitment and referral of employees, and that the employees were paid by its paychecks. Two other factors herein indicate that a finding of joint employer status is warranted: that the same lawyer represented both Respondents and that Respondents did not comply with the subpoenas issued by counsel for the General Counsel and did not present any witnesses or evidence. Therefore, counsel for General Counsel is entitled to an adverse inference that these documents and witnesses would have established that Respondent N and W had additional control over Nunez' terms and conditions of employment.

In *Auto Workers v. NLRB*, 459 F.2d 1329, 1338 (D.C. Cir. 1972), the court stated:

> The reason why existence of a subpoena strengthens the force of the inference should be obvious. If a party insists on withholding evidence even in the face of a subpoena requiring its production, it can hardly be doubted he had some good reason for his insistence on suppres-

> sion. Human experience indicates that the most likely reason for this insistence is that the evidence will be unfavorable to the cause of the suppressing party.

In *National Football League*, 309 NLRB 78, 97–98 (1992), Administrative Law Judge Benjamin Schlesinger stated:

> The adverse inference rule states that, when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him. An inference may even be warranted that the material which the party refuses to show supports exactly the opposite of what he contends at the hearing.

In *International Automated Machines*, 285 NLRB 1122, 1123 (1987), the Board stated, ''when a party fails to call a witness who may reasonably be assumed to be favorably disposed toward the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.'' In *NLRB v. Shelby Memorial Hospital Assn.*, 1 F.3d 550, 553 (7th Cir. 1993), the court stated, ''The failure of an employer to produce relevant evidence particularly within its control allows the Board to draw an adverse inference that such evidence would not be favorable to it.'' I therefore find an adverse inference against the Respondents due to their failure to turn over the subpoenaed documents as well as their failure to present any witnesses herein. This adverse inference, together with the evidence discussed above, leads me to conclude the Respondent Riverdale and Respondent N and W were joint employers.

The remaining allegation is that on about February 18, Respondent discharged Nunez because of his attempts to join the union and obtain the benefits of the Union contract, in violation of Section 8(a)(1) and (3) of the Act. The credible testimony establishes beginning in about early 1992, Nunez complained to Matos on five or six occasions that he was not receiving the fringe benefits that the other (union) employees were receiving. In July 1992, and on December 1, 1993, he filed grievances with the Union complaining that he was not in the Union, and on November 16, 1993, he filed a charge with the Board alleging that Respondent Riverdale violated Section 8(a)(1) and (3) of the Act by refusing to let him join the Union. He withdrew this charge the following month. When Cayaso met with Buchsbaum, he told her that Nunez was not in the Union because he didn't work for him, he was an agency employee. He said that he was happy with Nunez' work, but if she insisted on putting him in the Union, he would have to let him go. When they met again 2 days later, Buchsbaum again said that he was happy with Nunez' work, ''but if you insist . . . I can fire him now.'' The evidence establishes that Nunez and the Union did not go along with Buchsbaum's threat, and on December 9, 1993, Nunez filled out a union authorization card and left part with Respondent Riverdale, and on about February 10, filled out another card, but left both portions with the Union. In addition, on December 16, 1993, Copeland sent Respondent Riverdale a demand for arbitration of Nunez' dispute, and on February 10 sent Nunez' dues-authorization card to Respondent Riverdale ''to begin checkoff.'' About a week after Respondent Riverdale received this letter, Matos notified Nunez that he was fired, without either a reason or a warning, fulfilling Buchsbaum's threat 2 months earlier. Considering this background, and the sudden nature of Nunez' termination, it is difficult to imagine a more obviously discriminatory discharge, even without adverse inferences, and I so find. *Wright Line*, 251 NLRB 1083 (1980).

CONCLUSIONS OF LAW

1. The Respondents, Riverdale Nursing Home, Inc. and N and W Registry, Inc., are joint employers within the meaning of the Act and have been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents violated Section 8(a)(1) and (3) of the Act by discharging Nelson R. Nunez on about February 18, 1994.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondents unlawfully discharged Nunez, I shall recommend that they be ordered to offer him immediate reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, to make him whole for the loss he suffered due to the discrimination, and to remove from their files any reference to the discharge. Backpay shall be computed in accordance with *F. W. Woolworth*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommend Order omitted from publication.]